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ARTICLE

LIABILITY OF CHILD SOLDIERS UNDER INTERNATIONAL CRIMINAL LAW

Fanny Leveau[♦]

The phenomenon of child soldiers has gained increased attention since the condemnation, last year, of Thomas Lubanga for recruiting and using child soldiers. However, not much has been said about the crimes perpetrated by those children. This article looks at child soldiers as perpetrators of crimes and examines their potential criminal accountability under international criminal law. Interpretation of international instruments suggests that child soldiers could be prosecuted by international criminal tribunals. However, those prosecutions would have to respect specific standards.

Child soldiers can be viewed as victims, recruited to commit military acts against their will. The act of recruiting child soldiers is a war crime¹; however, as soldiers, they may be perpetrators of the

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¹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) [*Rome Statute*], arts 8(2)(b)(xxvi) and 8(2)(e)(vii); *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed 16 January 2002, 2178 UNTS 138 (entered into force 12 April 2002) [*Statute of the SCSL*], art 4(c).

crimes of torture, maiming, rape, and the killing of civilians.² Therefore, the question arises as to whether they should be held liable for these crimes. Indeed, one may wonder why children would be shielded from prosecution when they commit such crimes. The aim of this article is to explore the arguments given in favour of and opposed to the criminal liability of children in order to establish conclusions regarding the liability of child soldiers under international criminal law. One may feel that children should be held accountable for their crimes because it would serve justice for the victims; however, it appears to be difficult to defend accountability for children who may be too young to be considered capable of committing crimes, or, in many situations, who acted under duress when committing crimes. The legal discussion on the issue of criminal liability of child soldiers is primarily based on the concept of *mens rea*. In other words, international criminal law must determine whether child soldiers can actually intend to commit international crimes. I will examine the difficulties raised by the prosecution of children at the international level. I will proceed to present arguments in favour of child criminal liability, thereby arguing that child soldiers should be prosecuted. I will place emphasis upon the obstacles to the prosecution of child soldiers. I conclude by arguing that if child soldiers are to be prosecuted, the minimum age for criminal liability should be fixed at fifteen years old and all the guarantees of a juvenile justice system should be offered.

I

ISSUES WHEN DEALING WITH CRIMINAL LIABILITY OF CHILDREN AT THE INTERNATIONAL LEVEL

So far, child soldiers have never been prosecuted by international criminal tribunals. Nevertheless, it is important to think about the theoretical possibility of the prosecution of children because of the increasing attention being given to the issue of child soldiering. Even so, the criminal liability of children is a difficult concept to think about at the international level for two reasons. First,

² Matthew Happold, "Child Soldiers, Victims or Perpetrators?" (2008) 29 U La Verne L Rev 56 at 79 [Happold, "Child Soldiers"].

psychological development varies from one child to another, which leads to a difficulty in determining when the required element of *mens rea* is acquired. Second, no minimum age for criminal liability exists under international law because countries conflict on what this age should be.

A. PSYCHOLOGICAL DEVELOPMENT OF THE CHILD AND CONSEQUENCES
OF THE REQUIRED *MENS REA* ELEMENT

An accused can be found liable under international criminal law only when the *actus reus* is committed with intent.³ This is referred to as *mens rea*. A crucial aspect to take into consideration in any discussion on the criminal liability of children is the ability for one child to act with this required intent. Many authors have written on the psychological development of the child and the subsequent ability to intend to commit a criminal act.⁴ Their studies demonstrate that, up to a certain age, a child is not fully able to understand his or her acts, nor the consequences attached to it; however, the exact age at which an individual can commit a criminal act with the required *mens rea* element is not clearly determined. This is a problem, in the sense that, from a psychological point of view, some children should be able to be found liable under international criminal law while others should not.

This conclusion is supported by neuroscientific research. Professor Naomi Cahn suggests that even though “the law has not historically depended on brain science, (...) the modern study of neuroscience offers the prospect of identifying more specific causes [related to adolescents’ criminal behaviours].”⁵ In her paper dealing with the impact of neuroscience on understanding child soldiers’ actions, she mentions that early abuse and neglect can change the structure of children’s brains: “when children are abused or neglected, their brains may develop so that they overact to situations that are

³ *Rome Statute*, *supra* note 1, art 30.

⁴ Jean Piaget, *The Moral Judgement of the Child* (London: Routledge & Kegan Paul, 1932) [Piaget]; L Kohlberg, *Child Psychology and Childhood Education - A Cognitive Developmental View* (New York: Longman, 1987).

⁵ Naomi Cahn, “Poor Children: Child “Witches” and Child Soldiers in Sub-Saharan Africa” (2006) 3 Ohio St J Crim L 413 at 429.

threatening so that delinquent behavior results from the brain using these early lessons of fear to defend itself.”⁶ These elements show that child soldiers are different from adults because their psychological and biological development is different. These observations must be taken into account when examining their criminal liability. Another huge difficulty in determining whether child soldiers could be held liable under international criminal law is the fact that international law does not provide for a minimum age of criminal liability.

B. ABSENCE OF MINIMUM AGE FOR CRIMINAL LIABILITY UNDER
INTERNATIONAL LAW

The minimum age for criminal liability represents the age at which an individual can be legally prosecuted for crimes. Under international law, an adult is understood to be an individual who has attained the age of eighteen years.⁷ It follows from this that if a child’s criminal liability does not exist, only adults can be prosecuted for international crimes. On the other hand, if liability does exist, the minimum age for criminal liability does not correspond with the age at which majority is attained. How is the age of criminal liability to be determined? This central question has unfortunately stayed unanswered under international law for decades. There is no overarching agreement among nations; the minimum age for criminal liability differs widely from one country to another, with one of the youngest ages fixed at six in some Mexican states for non-federal crimes, while the oldest age fixed at sixteen years in Argentina.⁸

International law does, however, provide minimal guidance on how to determine what the minimum age should be. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (or “Beijing rules”) provide that:

⁶ *Ibid* at 426.

⁷ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 (entered into force 2 September 1990) [*CRC*]. This treaty is one of the most widely ratified international instruments. In article 1, it states that “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” This may be understood as an international consensus.

⁸ UNICEF, “Special Protections: Progress & Disparity” in *The Progress of Nations 1997*, online: UNICEF <<http://www.unicef.org/pon97/p56a.htm>>.

[i]n those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age limit, bearing in mind the facts of emotional, mental and intellectual maturity.⁹

This non-binding notion was since codified and expanded in the Convention on the Rights of the Child (“CRC”) in its article 40(3):

State parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.¹⁰

The Committee on the Rights of the Child (the “Committee”), which is tasked with interpreting the CRC, recommends that this minimum age not be too low; indeed, it has asked some countries to raise the minimum age provided in their domestic legislation.¹¹ However, the practice of the Committee is of little help in determining a standard minimum age for criminal liability under international law. As noted by some:

it is not helpful in seeking to move towards consistency when it [the Committee] criticizes the minimum age of 10 in England as being unlawful, while only recommending that Ireland, which had just raised the minimum age from 7 to

⁹ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UNGAOR, 40th Sess, UN Doc A/Res/40/33, (1985) 206 [*Beijing Rules*], r 4.

¹⁰ *CRC*, *supra* note 7, art 40(3).

¹¹ Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, 16th Sess, UN Doc CRC/C/15/Add.79, (1997); Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: India*, 23d Sess, UN Doc CRC/C/15/Add.115 (2000); Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Fiji*, 18th Sess, UN Doc CRC/C/15/Add.89 (1998); Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland*, 8th Sess, UN Doc CRC/C/15/Add.34 (1995); Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Barbados*, 21st Sess, UN Doc CRC/C/15/add.103 (1999).

10, only consider reviewing the age with a view to increasing it.¹²

Comments from the Committee are, however, helpful to the extent that they provide guidance as to how criminal liability shall be determined. For instance, the Committee believes that criminal responsibility should be based on objective factors such as age instead of subjective factors such as “the attainment of puberty, the age of discernment or the personality of the child.”¹³

Similarly, international criminal law does not provide clarity in determining the minimum age of criminal liability. The statutes of various international criminal tribunals are conflicting on this point. While the International Criminal Tribunal for Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) statutes are silent on the issue, the Serious Crimes Panels in East Timor have jurisdiction over minors over twelve years of age¹⁴ and the Special Court of Sierra Leone (“SCSL”) has jurisdiction to prosecute children over fifteen years of age.¹⁵ However, the statute of the SCSL strictly regulates prosecution of children under eighteen years of age and privileges rehabilitation as opposed to other traditional aims of punishment.¹⁶ The SCSL has never prosecuted a person younger than eighteen, and the Chief Prosecutor, David Crane, had made it very clear that he would not prosecute children.¹⁷ The Rome Statute gives jurisdiction to the International Criminal Court (“ICC”) to prosecute individuals over eighteen years of age.¹⁸ While some may interpret the Rome Statute’s provision as establishing a rule under international criminal law because of the permanency of the ICC and its potential universal jurisdiction, this argument neglects

¹² Geraldine Van Bueren, *Art 40: Child Criminal Justice* (Boston: Martinus Nijhoff Publishers, 2006) at 27.

¹³ Committee on the Rights of the Child, *Report on the 10th Session*, 10th Sess, UN Doc CRC/C/46 (1995).

¹⁴ United Nations Transitional Administration in East Timor, Regulation 2000/30 Section 45 *On Transitional Rules of Criminal Procedures*, online: East Timor Law Journal <<http://www.eastimorlawjournal.org/UNTAETLaw/Regulations/>>

¹⁵ Statute of the SCSL, *supra* note 1.

¹⁶ *Ibid.*

¹⁷ See IRIN, “SIERRA LEONE: Special Court will not indict Children” online: IRIN <<http://www.irinnews.org/printreport.aspx?reportid=35524>>.

¹⁸ *Rome Statute*, *supra* note 1, art 26.

two things. First, the provision is more procedural than substantive.¹⁹ Exclusion from the jurisdiction of the ICC simply leaves the task of prosecuting child soldiers to domestic jurisdictions.²⁰ Second, it appears that the exclusion was to avoid arguments before the ICC as to what the minimum age for criminal liability should be under international law.²¹

In light of the above-mentioned considerations, one can say that a reasonable age to fix criminal liability should be somewhere in the mid-teens (thirteen, fourteen, fifteen).²² Most domestic systems recognize criminal liability around that age; therefore, this option would follow current state practice. It would also comply with the international guidance given on the issue. As well, it would be supported by psychological analyses that tend to demonstrate that from the age of fifteen years, children may be capable of moral responsibility. However, international criminal law must be precise and cannot vaguely prescribe that children in their mid-teens should be able to face international jurisdiction. Instead, a clear and precise age should be given. It would then be up to the court to determine whether it will prosecute children under eighteen. As was the case in Sierra Leone, a court might decide not to use its prerogative. The SCSL has the jurisdiction to prosecute children of fifteen years and older, and this would be a starting point in trying to determine what the age for criminal liability should be under international criminal law. This choice is reinforced by other provisions of international criminal law that have established fifteen as the minimum age to legally recruit and use children in armed forces.²³ This suggests that from that age, children are capable of making independent choices. Under the age of fifteen, children cannot legally join armed forces and therefore, they should not be held liable for their crimes under that age. This is not to suggest that children under fifteen cannot be perpetrators of international crimes. Some may have committed crimes with full

¹⁹ Happold, "Child Soldiers", *supra* note 2 at 79.

²⁰ Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (Munich, Germany: CH Beck, 2008) at 777.

²¹ *Ibid* at 775.

²² Matthew Happold, *The Age of Criminal Responsibility in International Criminal Law* (The Hague: TMC Asser Press, 2006) [Happold, "Age of Criminal Responsibility"].

²³ *Rome Statute*, *supra* note 1, art 8(2)(b)(xxvi); *Statute of the SCSL*, *supra* note 1, art 4(c).

conscience, but most of them might be too young to fully understand their acts. Similarly, children over fifteen may have committed crimes without fully understanding their acts. There is also some overlap, where children who were recruited before they were fifteen may have remained soldiers after, and subsequently committed crimes over the age of fifteen. A line must be drawn somewhere and the law must be clear. In most cases, children above fifteen do understand their acts and are capable of making independent choices such as joining an armed group. International criminal law has already recognized this and similarly, it should recognize fifteen as a compelling age for criminal liability.

This section has demonstrated that prosecuting children at the international level would certainly not be without difficulties. The main issue would relate to determining who is a child; examining on a case-by-case basis whether a specific child's psychological development allowed for an understanding of his or her criminal acts, and reaching a consensus on what the minimum age for criminal liability is. Thinking about whether child soldiers should be prosecuted by international criminal tribunals requires us to overcome these difficulties. It also requires justifications. In other words, if current practice of international criminal tribunals is to refuse to prosecute child soldiers, what would be the grounds under which one would say that, theoretically, they could be prosecuted?

II

RATIONALE FOR PROSECUTING CHILD SOLDIERS

As mentioned in the previous section, international criminal law is not clear on the issue of the minimum age for criminal liability. While the ICC does not have jurisdiction to prosecute children under eighteen, the SCSL has jurisdiction for those of fifteen years and over. This indeterminacy indicates that there is no categorical objection to the prosecution of children. Therefore, it is important to examine the rationales upon which international criminal law could rely, if it was decided that child soldiers could be prosecuted. Several arguments can be developed. First, such prosecutions are in accordance with the aim of international criminal justice. Second, they seem to be authorized by international human rights law. Third, most domestic systems

allow prosecutions of child soldiers and, in fact, some have done so. Finally, we are currently witnessing a case within international criminal law, that of Dominic Ongwen, indicating that the prosecution of individuals for crimes committed as children may be possible.

A. AIM OF INTERNATIONAL CRIMINAL JUSTICE: THEORIES OF PUNISHMENT

International criminal law pursues several goals which are quite similar to the ones found under domestic law. These include retribution and deterrence, but also other goals such as bringing justice to the victims. Emphasis of these goals is important since they may give substantial grounds to the argument that child soldiers should be prosecuted.

(i) Domestic Law vs. International Law

International criminal law deals with the most serious crimes of international concern.²⁴ International criminal tribunals have been established in order to make sure that those who violate these norms will respond to their acts. The idea is that some crimes are so horrific that the international community must ensure that perpetrators will not go unpunished. However, punishment may serve several goals and it is important to analyze whether theories of punishment found under international criminal law are the same as the ones found under domestic laws. One may think that the gravity of these international crimes, characterized by mass atrocity, would justify a different basis for punishment than domestic crimes. Moreover, the specificity of international criminality may justify additional aims for punishment, such as telling the history of a conflict or achieving reconciliation between societies.²⁵ However, it seems that theories of punishment find the same grounds in international criminal law as in domestic criminal law. Drumbl expresses this view when talking about international criminal law that “despite the extraordinary nature of

²⁴ *Rome Statute*, *supra* note 1.

²⁵ Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (New York: Cambridge University Press, 2010) at 31, 33.

this criminality, its modality of punishment, theory of sentencing, and process of determining guilt or innocence each remains disappointingly ordinary.”²⁶

(ii) Retribution and Deterrence

Theories of punishment have been developed to understand the rationale for prosecuting crimes that violate our most fundamental norms. First, there is the justification of retribution. This theory is often associated with Immanuel Kant,²⁷ and it is based on the idea that those who have violated social norms should be punished without regard for the possible benefits (or drawbacks) of a prosecution. Indeed, a wrongdoer should be punished only on the grounds that he or she has committed a crime. Other justifications such as the well-being of the society are irrelevant because they equate to using a human being as a tool to accomplish a specific goal.²⁸ This theory is to be distinguished from revenge. As explained by the ICTY: “[retribution] is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes.”²⁹ Looking at the jurisprudence of the international criminal tribunals, retribution is, alongside deterrence, the most prominent punishment rationale.³⁰ Moreover, it seems that in practice, international criminal law evidences a preference for retributive motivations.³¹

Based on this retributive theory, child soldiers should be prosecuted merely on the basis that they committed crimes. The outcome here is seen as consequential; someone who does wrong must be punished. However, there is an issue with this outcome because it seems to neglect the *mens rea* element. If committing a criminal act is sufficient to allow prosecution, it implies that only the *actus reus* is

²⁶ Mark Drumbl, “Collective Violence and Individual Punishment: The Criminality of Mass Atrocity” (2005) 99 NW U L Rev 539 at 541 [Drumbl, “Collective Violence”].

²⁷ Cryer, *supra* note 25 at 24.

²⁸ Immanuel Kant, *The Metaphysical Elements of Justice*, translated by John Ladd (London: The MacMillan Publishing Company, 1965) at 100.

²⁹ *Prosecutor v Zlatko Aleksovski*, IT-95-14/1, Judgment (24 March 2000) at para 185 (International Criminal Tribunal for former Yugoslavia, Appeals Chamber) online: ICTY <<http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>>.

³⁰ Drumbl, “Collective Violence”, *supra* note 26 at 559.

³¹ *Ibid* at 561.

taken into account. Karl Marx wrote that G.W.F. Hegel's theory on punishment would be the only valid one because it is the only one that "recognizes human dignity."³² According to Hegel:

[p]unishment is the *right* of the criminal. It is an act of his own will. The violation of right has been proclaimed by the criminal as his own right. His crime is the negation of right. Punishment is the negation of this negation, and consequently an affirmation of right, solicited and forced upon the criminal by himself.³³

Nevertheless, Marx also points out that individuals are acting under conditions of "capitalist unfreedom"³⁴ and therefore cannot be held responsible for their acts.³⁵ According to him, a theory of punishment is valid only where it elevates the criminal to "the position of a free and self-determined being."³⁶ Without entering in an analysis of class, Marx's view on punishment could by extension be applied to child soldiers in that it is based on the concept of freedom. Are child soldiers really free when they commit a crime? Here is where the *mens rea* element appears. Where someone is not free, how can he or she commit an intentional act? The same logic could apply to adult perpetrators. This negates the *mens rea* element, which is a fundamental principal of criminal law.

As opposed to a Kantian view of punishment, some may argue that the purpose of punishment is to serve society by promoting deterrence. According to Jeremy Bentham, all actions must create the greatest amount of happiness to the greatest amount of people.³⁷ It follows from this that a criminal should be punished proportionally to the amount of harm which is caused by the offence and should be sufficient to deter further offences.³⁸ One may wonder whether prosecuting child soldiers could be justified by deterrence because child soldiers do not really have a choice as to the crimes they

³² Karl Marx, "Capital Punishment" *New York Daily Tribune* (18 February 1853).

³³ *Ibid.*

³⁴ J Angelo Corlett, *Responsibility and Punishment*, 3d ed (Dordrecht, Netherlands: Springer, 2006).

³⁵ Marx, *supra* note 32.

³⁶ *Ibid.*

³⁷ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Amherst: Prometheus Books, 1988) ch I at 3.

³⁸ *Ibid.*, ch XIV.

commit. Therefore, it is doubtful that the deterrence argument would be powerful in this case.

Most of the time, retribution and deterrence would not be convincing justifications for the prosecution of child soldiers because child soldiers do not act under free will. However, this global reasoning is problematic because it neglects situations where child soldiers actually make free choices. These choices start at the stage of recruitment. It has been noted that “despite the ambiguity of “voluntary” recruitment in contexts of severely constrained choices, there is a complex rationale in a child’s decision to join whether for ideological commitment, self-defense or economic survival.”³⁹ Some children may be more mature than others and some who join for ideological commitment may strongly believe in their causes. While some children do not freely and voluntarily join an armed group, many others may do so. We must not automatically decide that children do not have free will simply because they are children. It is possible for a teenager around fifteen years to have a strong moral understanding. Therefore, in these cases, it would be right to prosecute children for the purposes of retribution and deterrence. It has been argued that:

it is reasonable to ask whether absolving children of responsibility for crimes they have committed is necessarily in the best interests of the child. In at least some cases, where the individual was clearly in control of their actions, and not coerced, drugged, or forced into committing atrocities, acknowledgement and atonement, including in some instances prosecution, might be an important part of personal recovery. It may also contribute to their acceptance by families, communities and society at large.⁴⁰

In the large majority of cases, retribution and deterrence could not justify prosecution of child soldiers for their crimes because their acts are not free. However, there may be some cases in which free will

³⁹ Dana Landau, “Child Soldiers - The Use of Child Soldiers”, online: International Relations and Security Network <www.isn.ethz.ch/isn/content/.../01%20Use%20of%20Children.pdf>.

⁴⁰ Coalition to Stop the Use of Child Soldiers, *Global Report 2008* (London: Coalition to Stop the Use of Child Soldiers, 2008) at 36 online: Child Soldiers International http://www.child-soldiers.org/global_report_reader.php?id=97.

and intent to commit crimes could be demonstrated. In these cases, prosecution could be justified under the grounds of retribution and deterrence. Prosecution of child soldiers could also be justified by the other goals international criminal law intends to achieve.

(iii) Other Goals

Apart from retribution and deterrence, international criminal justice has other goals which may be stronger grounds upon which to justify the prosecution of child soldiers. First, international criminal prosecutions may be pursued for the purpose of rehabilitation. According to this theory, the point of criminal sanction is the reformation of the wrongdoer.⁴¹ International criminal law applied this theory in the ICTY's *Erdomević* case by condemning the accused to only five years of imprisonment, despite his conviction for taking part in an execution squad which murdered hundreds of Bosnian Muslim civilian men between the ages of seventeen and sixty. This was classified as a crime against humanity. He killed approximately one-hundred persons. The tribunal stated that he "should be given a second chance to start his life afresh upon release, whilst still young enough to do so."⁴² Therefore, condemning child soldiers to low sentences may help them to reintegrate within the society while they are still young, and society would feel that the wrongs committed by child soldiers have been dealt with. It may also be more inclined to reaccept them and move forward.

The aim of rehabilitation goes hand in hand with another one—that of bringing justice to the victims. Traditionally, international criminal law focused on the accused in the sense that it is necessary for the accused to benefit from a fair trial.⁴³ However, international criminal law has been influenced by civil law systems such as France in which victims play a large part in the proceedings.⁴⁴ The ICC has developed an original way of dealing with victims by allowing them to participate in the proceedings when their interests are affected.⁴⁵

⁴¹ Cryer, *supra* note 25 at 28.

⁴² *Prosecutor v Erdemović*, IT-96-22-Tbis, Judgement (5 March 1998) at para 16 (International Criminal Tribunal for the former Yugoslavia, Trials Chamber).

⁴³ Cryer, *supra* note 25 at 478.

⁴⁴ *Ibid.*

⁴⁵ *Rome Statute*, *supra* note 1, art 68.

This is because it was recognized that one of the aims of international criminal law is to bring justice to the victims. As a result, “it would be paradoxical to keep saying victims should only have an auxiliary role when one of the reasons why proceedings take place is the victim itself.”⁴⁶ Justice for the victims may be the most relevant justification when dealing with prosecution of child soldiers. One can hardly imagine how victims of child soldiers would reaccept these children as part of their community without feeling that justice had been done. Therefore, this idea of bringing justice to the victims is crucial. Recent history demonstrates that international law recognizes that victims should be heard. Following the 1994 genocide in Rwanda, calls from victims of genocide to see the children who participated in it being prosecuted led to the arrest and detention of many children within Rwanda.⁴⁷ This situation represented the first time in history where children accused of committing genocide were imprisoned and tried.⁴⁸ Another example relates to Sierra Leone. At the time of discussions in 2000-2001 surrounding the creation of the SCSL to address crimes against humanity and war crimes committed after November 30, 1996, it was said that “the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability.”⁴⁹ Many children’s rights advocates argued that child soldiers should not be prosecuted within the SCSL;⁵⁰ nevertheless, the UN Secretary-General stated that:

Within the meaning attributed to it in the present Statute, the term “most responsible” would not necessarily exclude children between 15 and 18 years of age. [...] the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the

⁴⁶ Cryer, *supra* note 25 at 479.

⁴⁷ Chen Reis, “Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict” (1997) 28 Colum HRL Rev 629 at 629.

⁴⁸ *Ibid.*

⁴⁹ *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UNSCOR, 55th Sess, UN Doc S/2000/915 (2000), at para 35 [Report of the Secretary General].

⁵⁰ *Ibid.*

Court.⁵¹

Thus, the Statute for the SCSL permits the Prosecutor to prosecute individuals who were aged between fifteen and eighteen years at the time of their crime.⁵²

Prosecuting child soldiers at the international level could be supported in some cases by motives of deterrence and retribution. However, the most convincing argument would be that such prosecutions would form part of the process of bringing justice to the victims. The idea that children could be prosecuted was supported by some international organizations such as Amnesty International. It stated, “[i]n some cases, child soldiers must be held accountable for their actions, but any criminal action against them must respect international fair trial standards.”⁵³ Nevertheless, it is important to acknowledge tensions between the various existing motives for punishment. Retribution and deterrence being the primary goals of international criminal justice, we cannot be sure whether prosecution of child soldiers, when justified solely by the necessity to bring justice to the victims, would be appropriate. Moreover, victims may not see criminal prosecutions as the best way to obtain justice, for instance in societies where the focus is on reconciliation and forgiveness. However, prosecution of child soldiers can be justified on another ground; that being that such prosecutions are allowed by international human rights law.

B. ALLOWED BY INTERNATIONAL HUMAN RIGHTS LAW

Because of the newness of international criminal law, many unresolved issues, such as the question of whether or not child soldiers can be prosecuted, may find some guiding answers in the more established but related field of international human rights law. Therefore, it is important to see what that area of the law recommends. Interestingly, international human rights law does not

⁵¹ *Ibid* at para 30.

⁵² *Statute of the SCSL*, *supra* note 1.

⁵³ Amnesty International, “Child Soldiers: Criminals or Victims?” (22 December 2000) part 2, online: Amnesty International <<http://www.amnesty.org/en/library/asset/IOR50/002/2000/en/dom-IOR500022000en.html>>.

argue against child prosecution. Analysis of the CRC is a very strong indicator of the views of the international community on issues related to children's rights due to the fact that it is the most widely ratified international human rights instrument.⁵⁴ The CRC does not explicitly say that prosecution of children is authorized. Instead, it contains provisions on the criminal liability of children, stating that if a child is to be prosecuted, certain conditions must be respected. This is a strong indicator that the international community, through states' ratifications of the CRC, agrees that child prosecution could occur and *a fortiori* is authorized. Indirectly, it also means that the international community thinks that children can have the necessary *mens rea* when committing a crime. This conclusion conforms to the laws applicable domestically. Indeed, "under many national legal systems children as young as ten years (or even less in some jurisdictions) are deemed capable of forming the requisite intent to commit a crime."⁵⁵

The fact that an international treaty as widely ratified as the CRC recognizes that prosecution of children can occur at a domestic level impacts our understanding of international law. Indeed, provisions of the CRC have crystallized under customary international law.⁵⁶ Indirectly, this indicates that the international community is not substantially opposed to the prosecution of children at the international level. However, should children be prosecuted by international criminal tribunals such as the SCSL, these tribunals would have to respect standards provided by the CRC. Nevertheless,

⁵⁴ "By July 1, 1997, virtually every nation had ratified or acceded to the CRC, with the exception of the United States and Somalia": Jonathan Todres, Mark E Wojcik & Cris R Revas, eds, *The Convention on the Rights of the Child - An Analysis of Treaty Provisions and Implications of US Ratification* (New York: Transnational Publishers, 2006) at 14.

⁵⁵ Steven Freeland, "Mere Children or Weapons of War- Child Soldiers and International Law" (2008) 29 U La Verne L Rev 19 at 49.

⁵⁶ Customary international law reflects a general practice perceived as having the force of law. Because the CRC has been ratified by almost every nation, it is clear that it is perceived by states as having the force of law. Moreover, domestic and international tribunals have looked at the CRC for guidance and to support their decisions, thereby reflecting general practice. See *Roper v. Simmons* (2005) 543 US 551; also see *Sahin v Germany* (2003) ECHR, 30943/96, 36 EHRR 43; *Sommerfeld v Germany* (2003) ECHR, 31871/96; *Reports of the Inter-American Court of Human Rights (Art 64(1) of the American Convention on Human Rights)* (2002), Advisory Opinion OC-17/02, Inter-Am Ct HR (Ser A) No 17 online: <http://www1.umn.edu/humanrts/iachr/series_A_OC-17.html>.

one can argue that international crimes are different from domestic crimes. Therefore, the analysis at the international level should be different from the one that occurs at the domestic level. The main issue here occurs in terms of *mens rea*. As noted above, for many countries, children are capable of having the intent to commit a crime. However, Happold notes that others have argued that international crimes cannot be intentionally committed by children because they require such onerous *mens rea* requirements that children will always lack capacity to commit them.⁵⁷ Happold disagrees with this, and argues that while genocide requires specific intent, other international crimes do not require such a high burden of proof and therefore this argument cannot be used to distinguish between crimes committed under domestic laws from crimes committed under international law.⁵⁸ This argument is powerful and emphasises the idea that the intentional element is the same for international crimes as for domestic crimes only when dealing with war crimes. This means that the CRC is to be understood as applying in the same way to domestic crimes and war crimes. It could apply differently to genocide.

The idea that children can be prosecuted when they commit crimes is supported by the international community through wide ratification of the CRC, but also through ratification of regional treaties. For instance, the African Charter on the Rights and Welfare of the Child (“African Charter”) contains a provision on the administration of juvenile justice.⁵⁹ This instrument has been ratified by thirty-seven African states out of fifty-three.⁶⁰ This means that, in addition to agreeing through ratification of the CRC children can be prosecuted, a large majority of African states reiterated their commitment to this idea. In addition, the European Court of Human Rights (“ECHR”), which is also governed by a regional treaty, ruled in the same way. In the case of two ten year-old boys who abducted and killed a two year-old and were convicted,⁶¹ the ECHR ruled that:

⁵⁷ Happold, “Child Soldiers” *supra* note 2 at 72.

⁵⁸ *Ibid.*

⁵⁹ African Charter on the Rights and Welfare of the Child, 11 July 1990, OAU Doc CAB/LEG/24.9/49 (entered into force 29 November 1999), arts 17 and 30.

⁶⁰ Africa Union “Status of Ratification of the Charter as at February 2004”, online: <<http://www.africa-union.org/child/home.htm>>.

⁶¹ *T v United Kingdom* and *V v United Kingdom*, [2000] 30 EHRR 121.

even if England and Wales is among the few European jurisdictions to retain a low age of criminal responsibility, the age of ten cannot be said to be so young as to differ disproportionately from the age limit followed by other European States. The Court concludes that the attribution of criminal responsibility does not in itself give rise to a breach of Article 3 of the Convention.⁶²

However, the conclusion drawn from this decision can be contested in the sense that the two boys were tried in an adult court, before a judge and a jury and during public hearings.⁶³ Therefore, no specific procedure as guaranteed by the CRC was used.⁶⁴

As illustrated above, international human rights law contains provisions on child criminal liability. Many domestic jurisdictions allow the prosecution of children who commit crimes and international human rights law acknowledges this fact. But in doing so, it also gives conditions under which such prosecutions can occur. For instance, it limits the range of sanctions by formally prohibiting the death penalty. Because international human rights law does not prevent national jurisdictions from prosecuting child soldiers, its corollary is that international human rights law does not go against prosecution of child soldiers at the international level as long as special standards are respected.

C. DOMESTIC PROSECUTIONS OF CHILD SOLDIERS

The Rome Statute of the ICC is being implemented at the domestic level by its States Parties. Most of these domestic jurisdictions have a juvenile justice system in place, thereby allowing prosecution of children. This indicates that, child soldiers could be prosecuted by many domestic systems, and this has, in fact, already occurred in several instances.

⁶² *Ibid* at 176.

⁶³ Matthew Happold, "The Age of Criminal Responsibility in International Criminal Law" in Karin Arts & Vesselin Popovski, eds, *International Criminal Accountability and the Rights of Children* (The Hague: T.M.C. Asser Press, 2006), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=934567> at 5 [Happold, "Age of Criminal Responsibility in ICL"].

⁶⁴ *Ibid*.

(i) *Implementation of the Rome Statute by Domestic Systems*

States party to the Rome Statute have a legal obligation to include the international crimes contained in the Rome Statute within their own domestic systems.⁶⁵ For instance, in Canada, the *Crimes Against Humanity and War Crimes Act* was introduced in order to “implement the Rome Statute of the International Criminal Court.”⁶⁶ Since the minimum age for criminal liability in Canada is twelve years, it means that, in theory, a child could be prosecuted in Canada for international crimes. Another example is the case of France, which is a monist system, meaning that the Rome Statute has a direct effect on domestic law.⁶⁷ However, in order to be able to implement its obligation of complementarity, the French domestic system had to modify the criminal code.⁶⁸ It was necessary to introduce the exact same crimes as the ones provided in the Rome Statute. Under French law, children are not criminally responsible unless they are capable of understanding their acts.⁶⁹ This means that a child could be prosecuted under French law for international crimes. It is important to mention that 114 countries have ratified the Rome Statute and sixty-five of them have already implemented it within domestic law.⁷⁰ Thirty-five countries also have some form of advanced draft implementing legislation.⁷¹ This data suggests that, in sixty-five countries, individuals can be prosecuted for international crimes within the jurisdiction of the ICC and another thirty-five countries

⁶⁵ Art 1 of the Rome Statute provides that the ICC is complementary to national criminal jurisdiction. In his inaugural speech, the ICC prosecutor introduced the idea of positive complementarity. Under this principle, the ICC shall encourage national systems to prosecute crimes that fall under the ICC jurisdiction. It is to be contrasted with negative complementarity under which the ICC prosecute crimes within its jurisdiction when states are unwilling or unable to do so: Benjamin N Schiff, *Building the International Criminal Court* (New York: Cambridge University Press, 2008) at 117.

⁶⁶ *Crimes against Humanity and War Crimes Act*, SC 2000, c 24.

⁶⁷ *Constitution de la République Française*, JO, 4 October 1958, art 55.

⁶⁸ Art 212-2 of the Criminal Code was modified by law 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour Pénale Internationale.

⁶⁹ art 122-8 C pén.

⁷⁰ Coalition for the International Criminal Court, “Ratification and Implementation”, online: Coalition for the International Criminal Court <<http://www.iccnw.org/?mod=ratimp>>.

⁷¹ *Ibid.*

will soon be able to do so. As mentioned earlier in this article, most countries allow for the prosecution of children in their domestic system. This leads to the conclusion that, potentially, a majority of the countries in the world could prosecute children for international crimes within their domestic system. If most of the domestic laws, including those that have been imported from the international level, allow for the prosecution of children, then why should international criminal law rule in a different way?

(ii) Domestic Prosecutions of Child Soldiers

Theoretical considerations which state that child soldiers could be prosecuted by most domestic systems are supported to some extent by states' practices. Child soldiers have been prosecuted in Africa and more recently by the United States.

(a) In Africa

In Africa, child soldiers have been charged under domestic laws for international crimes including war crimes. For instance, in 2000, the Democratic Republic of Congo ("DRC") executed a fourteen year-old child soldier and, in 2001, another four aged between fourteen and sixteen were condemned to death.⁷² In the end, these children were not executed due to pressures from non-governmental organizations ("NGOs").⁷³ In Uganda, two former child soldiers were accused of treason.⁷⁴ However, these charges were later withdrawn, following lobbying by Human Rights Watch, on the basis that Uganda was under the international obligation to rehabilitate child soldiers.

⁷² Human Rights Watch, "Letter to Foreign Minister of Democratic Republic of Congo" (2 May 2001), online: Human Rights Watch <<http://www.hrw.org/wr2k1/index.html>>; Human Rights Watch, Press Release "Congo: Don't Execute Child Soldiers: Four Children to be Put to Death" (2 May 2001), online: Human Rights Watch <<http://www.hrw.org/press/2001/05/congo0502.html>>; Human Rights Watch, "Congo Spares Child Soldiers" (June 2001), online: HRW <<http://hrw.org/updatew/2001/06.html>>.

⁷³ *Ibid.*

⁷⁴ Human Rights Watch, "Uganda: Letter to Minister of Justice" (19 February 2003), online: HRW <<http://hrw.org/pres/2003/02/uganda021903-ltr.html>>; Human Rights Watch, Press Release "Uganda: Drop Treason Charges against Child Abductees" (March 4, 2003), online: HRW <<http://www.hrw.org/press/2003/03/uganda030403.html>>.

Another interesting case is the situation in Rwanda mentioned earlier, under which children were charged at the domestic level with committing genocide, an international crime implemented domestically. It was reported that almost 4000 children were detained in Rwanda following the genocide, only 1500 of whom had been released from detention by 2001.⁷⁵ Two institutions allowed prosecution of child soldiers: the domestic courts and *gacaca* proceedings. *Gacaca* proceedings are a traditional method of dispute resolution adapted to promote accountability for offenses related to genocide.⁷⁶ *Gacaca* proceedings are different from the Rwandan conventional courts because their focus is on both retribution and reconciliation.⁷⁷ Because of this, *gacaca* proceedings offer a more diversified array of punishment ranging from imprisonment to community service.⁷⁸ *Gacaca* proceedings also recognize that minors should be treated differently from adults. Minors under fourteen years cannot face prosecution but can be placed in special solidarity camps, whereas minors between fourteen and eighteen must benefit from reduced punishment.⁷⁹ Rwandan legislation provides that offenders under the age of fourteen cannot incur penal responsibility.⁸⁰ Offenders between the age of fourteen and eighteen are entitled to raise their status as minors as a mitigating factor in sentencing.⁸¹ In prosecuting those responsible for genocide, the Rwandan courts applied these mitigating factors. For instance, a minor under eighteen found guilty before domestic courts of killing five Tutsi children was sentenced to only five years' imprisonment.⁸² A last example is the one of DRC where, very recently, a fifteen year-old accused of rape was found to be outside the jurisdiction of a military court which tried individuals for crimes against humanity and was sent to be tried in a

⁷⁵ Nienke Grossman, "Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations" (2007) 38 Geo J Int'l L 323 at 351.

⁷⁶ Mark Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007) at 85 [Drumbl, "Atrocity, Punishment"].

⁷⁷ *Ibid* at 86.

⁷⁸ *Ibid* at 88.

⁷⁹ *Ibid*.

⁸⁰ *Ibid* at 79.

⁸¹ *Ibid*.

⁸² *Ministère Public v. Nzabonimpa*, RMP 69.430/S4/KD, RP/R1/98 (28 December 1998) (Gisenyi 1ère Instance).

domestic juvenile court.⁸³ Read together, these elements may be interpreted as indicating that child soldiers may be prosecuted under domestic jurisdictions, under the condition that their status as juveniles is respected. Therefore, if they are to be prosecuted, juvenile justice systems should be used.

(b) The Case of Omar Khadr

Omar Khadr is a Canadian citizen who was born in 1986. It is alleged that his father “was a high-ranking member of Egyptian Islamic Jihad, a senior Al-Qaeda operative and a close associate of Osama bin Laden.”⁸⁴ It is also alleged that from 1996 until 2001, Khadr:

travelled throughout Afghanistan with his father meeting senior Al-Qaeda members and visiting Al-Qaeda training camps and guest houses. In the summer of 2002, he received personal training in the use of arms and explosives and, on completion of his training, joined a team of Al-Qaeda operatives constructing and planting landmines targeted against U.S. and coalition forces.⁸⁵

Khadr is accused by U.S. officials to have murdered the U.S. sergeant Christopher Speer by throwing a grenade at him during a firefight between U.S. Special Forces and a group of Al-Qaeda operatives.⁸⁶ Following his arrest and transfer to Guantanamo Bay, Khadr was charged under the newly created system of Guantanamo Military Commissions with “conspiracy, murder by an unprivileged belligerent, [and] attempted murder by an unprivileged belligerent.”⁸⁷ However, these commissions were later struck down as being unconstitutional.⁸⁸ Instead, new charges were brought against Khadr

⁸³ Kelly Askin, “Guilty”, online: Blog Open Society <<http://blog.soros.org/2011/02/fizi-diary-guilty/>>.

⁸⁴ Happold, “Child Soldiers”, *supra* note 3 at 59.

⁸⁵ *Ibid.*

⁸⁶ *Ibid* at 57.

⁸⁷ *US v Omar Khadr*, Case No 05-0008, United States Military Commission, online: <http://www.asser.nl/upload/documents/20120820T102927-Khadr_Omar_Charges_Nov_2005.pdf>.

⁸⁸ *Hamdam v Rumsfeld*, [2006] 548 US 557. It was held in this case that the military commissions lack “the power to proceed because its structures and procedures violate

after the *Military Commission Act* was signed.⁸⁹ These include “Murder in Violation of the Law of War, Attempted Murder in Violation of the Law of War, Conspiracy, [and] Providing Material Support for Terrorism and Spying.”⁹⁰ In October 2011, he entered a guilty plea.⁹¹ According to the plea agreement, Khadr pled guilty “in exchange for an eight-year sentence, with a likely transfer to a Canadian prison after one year.”⁹²

Khadr’s case is controversial in many aspects and his prosecution has been widely criticized. Commentators such as David Crane, the first Prosecutor at the SCSL, have argued that child soldiers, including Omar Khadr, should not be prosecuted. They are primarily seen as victims who do not have the choice but to kill and therefore lack the *mens rea* to commit war crimes.⁹³ Other commentators such as Matthew Happold do not exclude the idea that child soldiers could be prosecuted under certain circumstances; however, they have criticized the process under which Omar Khadr was prosecuted.⁹⁴ In prosecuting Omar Khadr, the United States did not respect its international obligations in terms of respecting juvenile justice standards.⁹⁵

Countries that have ratified the Rome Statute are under the obligation to prosecute individuals accused of international crimes. This obligation implies that when these countries have a functioning juvenile justice system, they are under the obligation to prosecute child soldiers when appropriate. However, due to states’ overlapping

both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949.”

⁸⁹ *Military Commissions Act of 2006*, Pub L No 109-366, 120 Stat 2600.

⁹⁰ See the indictment in the case of *United States v Omar Khadr*, online: <<http://www.defense.gov/news/Apr2007/Khadrreferral.pdf>>.

⁹¹ Jeanne Meserve, “Youngest Guantanamo detainee pleads guilty” *CNN* (25 October 2010), online: CNN <<http://www.cnn.com/2010/US/10/25/khadr.plea/>>.

⁹² Andrea Prasow, “Khadr’s Plea Agreement and Sentencing: Questions Never to be Answered” (5 November 2010), online: Amnesty International <<http://www.hrw.org/en/news/2010/11/05/khadr-plea-agreement-and-sentencing>>.

⁹³ David Crane, “Children as Terrorists, Wrong to Train, Wrong to Charge” (2008), online: Jurist Forum <<http://jurist.org/forum/2008/02/children-as-terrorists-wrong-to-train.php>>.

⁹⁴ Happold, “Child Soldiers” *supra* note 2 at 72.

⁹⁵ Human Rights Watch, “The Omar Khadr Case: A Teenager Imprisoned at Guantanamo” (June 2007), online: Human Rights Watch <<http://www.hrw.org/en/reports/2007/06/01/omar-khadr-case>>.

obligations between the Rome Statute and other international treaties, states are also under the legal obligation to respect standards imposed by other international instruments. If domestic systems must prosecute child soldiers, respecting international standards, why would international criminal justice be different?

D. OPENINGS UNDER INTERNATIONAL CRIMINAL LAW: PROSECUTION OF CHILDREN FOR INTERNATIONAL CRIMES

The argument that children could be prosecuted by international criminal tribunals is strengthened by the current legal framework. Indeed, the ICC appears to be heading in the direction of permitting the prosecution of child soldiers. The Lord's Resistance Army abducted Dominic Ongwen when he was ten and he has since fought with that group.⁹⁶ The ICC has issued an arrest warrant against him for three counts of crimes against humanity and four counts of war crimes.⁹⁷ However, the question of whether he can be held liable is controversial because he is a complex political victim.⁹⁸ His early victimization created the conditions under which he committed serious crimes and also the conditions under which he became one of the leaders of the Lord's Resistance Army. Dominic Ongwen has not yet been arrested and the mandate of the ICC only allows the prosecution of crimes that happened after 2002.⁹⁹ At that time, Dominic Ongwen was already an adult. Therefore, the case does not directly illustrate a situation where an individual is being prosecuted for crimes committed when he was a child. It does show a willingness of the ICC to consider that victimization whilst a young child does not necessarily imply lack of the *mens rea* requirement once you are an adult.

Child soldiers are not merely innocent victims. They are also perpetrators of international crimes. For this reason, arguments that

⁹⁶ Justice and Reconciliation Project, "Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen" (July 2008), *JRP Field Note 7*, online: <http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf> ["Ongwen Field Note"].

⁹⁷ See International Criminal Court, Pre-Trial Chamber II Warrant of Arrest for Dominic Ongwen, online: <<http://www.icc-cpi.int/iccdocs/doc/doc97201.pdf>>.

⁹⁸ "Ongwen Field Note", *supra* note 96.

⁹⁹ *Rome Statute*, *supra* note 1, art 11(1).

they should be prosecuted can be made. However, prosecuting child soldiers may not be in accordance with the mandate of international criminal tribunals, which is to prosecute those who are the most responsible.¹⁰⁰ How can one seriously consider that a child who is a victim of the crime of recruitment, and used to participate actively in hostilities, would be the most responsible for the subsequent crimes that occur? In addition to this, if international criminal tribunals were to prosecute children, major difficulties would occur.

III

RATIONALE FOR EXCLUDING THE PROSECUTION OF CHILD SOLDIERS

The previous section emphasized the arguments one can make in favour of prosecuting child soldiers by international criminal tribunals. However, there are also strong reasons to advocate in favour of excluding such prosecutions. The prosecution of child soldiers should not be allowed by international criminal law for three reasons. First, even though the CRC contains provisions that can be understood as favouring prosecution of child soldiers, it also contains a provision on the best interests of the child. It is doubtful that prosecuting child soldiers would be in their best interests. Second, prosecuting child soldiers would raise serious practical issues. International criminal tribunals, with the exception of the SCSL, do not allow for such prosecutions. Though theoretically it would be possible for some criminal tribunals to do so, one should consider the difficulties that would arise. Third, in the event one argues that, theoretically, child soldiers could be prosecuted by international criminal tribunals and overcomes the challenges linked to such prosecutions, it is unlikely that such prosecutions would be a success. Indeed, child soldiers would be entitled to raise defences provided by international criminal law and would rule out their liability.

A. SPECIAL GUARANTEES AND THE “BEST INTERESTS” OF THE CHILD

The CRC contains provisions on child criminal liability which

¹⁰⁰ *Statute of the SCSL*, *supra* note 1, art 1(1).

allows one to think that the CRC supports prosecution of children. However, these specific provisions have to be read in accordance with article 3 of the CRC which refers to the “best interests” of the child as a primary consideration.¹⁰¹ The Beijing rules also establish that the aims of juvenile justice should include an emphasis on the “well-being of the juvenile.”¹⁰² It is difficult to see how international prosecution of children who are victims of those who recruit and use the soldiers would serve the best interests of these children. Instead, the purpose of juvenile justice is rehabilitation and, therefore, criminal prosecutions should be a last resort.¹⁰³ Moreover, in the context of the debates on whether or not the SCSL should prosecute child soldiers, some argued that the prosecution of child soldiers would not serve their best interests and other solutions such as truth and reconciliation commissions might be more appropriate.¹⁰⁴ The Report from the UN Secretary-General mentions that:

the international non-governmental organizations responsible for child-care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objections to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved.¹⁰⁵

¹⁰¹ *CRC*, *supra* note 7, art 3.

¹⁰² *Beijing Rules*, *supra* note 9, r 5.

¹⁰³ Daniel Ryan, “International Laws and Laws of War and International Criminal Law - Prosecution of Child Soldiers - *United States vs Omar Khadr*” (2010) 33 *Suffolk Transnat'l L Rev* 175 at 184.

¹⁰⁴ Judit Arenas, the Media Director for the Coalition to Stop the Use of Child Soldiers, declared that truth and reconciliation Commissions would “better serve the interest of the children than criminal proceedings previously proposed”; Jo Becker, Advocacy Director of the Children's Rights Division of the New York-based Human Rights Watch (HRW), declared that TRC is an “avenue for children to recount their involvement in and accept appropriate responsibility” for violations of human rights; Alfred Ironside, spokesman for the UN Children's Fund (UNICEF), said, “We support the view that the child soldiers should go before a truth and reconciliation commission than be prosecuted, since it will be in the best interest of the child.”; Marwaan Macan-Markar, “Prosecuting Child Soldiers for War Crimes, Good or Bad Idea?” (13 January 2001), online: Inter Press Service <<http://www.ipsnews.net/2001/01/rights-prosecuting-child-soldiers-for-war-crimes-good-or-bad-idea/>>.

¹⁰⁵ Report of the Secretary General, *supra* note 49, paras 34-35.

The Office of the UN Special Representative for Children in Armed Conflict argued that:

based on the current practice of ad hoc tribunals, the Special Court for Sierra Leone and the International Criminal Court, there is an emerging consensus that children below the age of 18 should not be prosecuted for war crimes and crimes against humanity by international courts.¹⁰⁶

Moreover, some argue that children “have no place at a war crimes tribunal, no matter how benevolent such a tribunal may be towards them.”¹⁰⁷

Prosecuting child soldiers may not be the best way to ensure their reintegration and therefore, it may be against their best interests. Even if prosecutions were not a barrier to their best interests, other issues would have to be considered.

B. PRACTICAL ISSUES

Currently only the SCSL allows for prosecutions of child soldiers, but it has never used its power to do so. This section aims at giving an idea of practical concerns which international criminal tribunals, including the ICC, would have to face if child soldiers were prosecuted before them. International criminal tribunals simply do not have the resources in place to ensure solid application of the rights that should be guaranteed to juvenile offenders. In the CRC, children are guaranteed procedural rights that are common to adults such as the presumption of innocence but also specific rights such as the right to privacy at all stages of the proceedings.¹⁰⁸ International criminal proceedings are structured around the principle of public hearings and this principle is included in the statutes of international criminal

¹⁰⁶Human Rights Council, *Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UNHRCOR, 12th Sess, UN Doc A/HRC/12/49 (2009) 13. online: Human Right Council <<http://www.unhcr.org/refworld/docid/4a9d1bf10.html>> at 13.

¹⁰⁷ Ilene Cohn, “The Protection of Children and the Quest for Truth and Justice in Sierra Leone” (2001) 55 J Int’l Aff 6 at 14.

¹⁰⁸ CRC, *supra* note 7, art 40(2)(b)(i) and (vii).

tribunals.¹⁰⁹ Exceptions to the principle of public hearings are provided by the Rome Statute in order, for instance, to protect victims, witnesses or the accused.¹¹⁰ However, the Statute of the SCSL, which allows for the prosecution of child soldiers, does not contain any provision on the practical application of the right to privacy of children. It only mentions that “the accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.”¹¹¹ The issue here is to determine what the “measures” are. One can imagine that protective measures would be the same accorded to victims and witnesses of the ICC such as protection of identity or distortion of voices and faces.¹¹² However, there is currently one very controversial protective measure, which is the use of anonymous witnesses.¹¹³ It has been argued that it goes against the principle of transparency and fair trial for the accused.¹¹⁴ Does the right to privacy include the right to be prosecuted anonymously in the case of child soldiers?

Another practical problem with prosecuting child soldiers is the double role they may play. In the ICC, victims’ participation is a novelty and has appeared to be necessary.¹¹⁵ The Rome Statute provides that:

where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not

¹⁰⁹ *Rome Statute*, *supra* note 1, art 67(1); *ICTY Statute*, art 21(2); *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994, 33 ILM 1598, art 20(2).

¹¹⁰ *Ibid*, arts 68(2), 21 & 22.

¹¹¹ *Statute of the SCSL*, *supra* note 1, art 17(2).

¹¹² Markus Funk, *Victim’s Rights and Advocacy at the International Criminal Court* (New York: Oxford University Press, 2010) at 123.

¹¹³ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-108, Decision Establishing General Principles Governing Application to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Statute (19 May 2006) (International Criminal Court, Pre-Trial Chamber I), online: ICC <<http://www.icc-cpi.int/iccdocs/doc/doc192088.PDF>>; Salvatore Zappalà, “The Rights of the Victims vs the Rights of the Accused” (2010) 8 JICJ 137 at 150.

¹¹⁴ *Ibid*.

¹¹⁵ Mariana Pena, “Victim Participation at the International Criminal Court: Achievements made and Challenges Lying Ahead” (2010) 16 ILSA J Int’l & Comp L 497 at 502.

prejudicial to or inconsistent with the rights of the accused
and a fair and impartial trial.¹¹⁶

But what about case situations where victims are the same as the perpetrators? Would it be fair to prosecute a child as a perpetrator while knowing that he or she could also be considered a victim? Wording of the Rome Statute indicates that as long as personal interests of the victims are affected, these victims shall be able to present their views and concerns at all stages of the proceedings. Child soldiers cannot be prosecuted by the ICC. However, if this was an option, it means that child soldiers accused of international crimes and prosecuted by the ICC could legitimately request the status of victim. This duality victim-perpetrator would pose a major challenge.

C. DEFENCES UNDER INTERNATIONAL CRIMINAL LAW

International criminal law is governed by general principles of liability. In order to be found criminally liable, the elements of *actus reus* (criminal act), *mens rea* (intent to commit a criminal act) and grounds for excluding liability have to be examined. Concerning crimes committed by child soldiers, the *actus reus* may be quite easy to prove, assuming a prosecutor can locate witnesses or other evidence. The next step is to examine whether the child had the intention to commit such an act. As mentioned above, domestic systems are entitled to determine a minimum age for criminal liability under which an individual is deemed to be criminally irresponsible. Such provisions are used to reflect the idea that, up to a certain age, an individual does not have the capacity to fully understand his or her acts and the consequences of these acts. Therefore, a lack of *mens rea* is presumed. As noted earlier, international criminal law does not determine a minimum age for criminal liability, so one cannot say exactly where the line is to be drawn. However, one might suggest that since the ICC does not have jurisdiction to prosecute minors, minority status is a valid ground to go unpunished.¹¹⁷ Child soldiers could also raise the defence of intoxication. Many studies have shown that child soldiers are compelled to take alcohol or drugs in order to

¹¹⁶ *Rome Statute*, *supra* note 1, art 68(3).

¹¹⁷ *Ibid*, art 26.

make them become fearless.¹¹⁸ Since the use of both impairs judgment, international criminal law recognizes that involuntary intoxication is an excuse.¹¹⁹ Last but not least is the defence of duress. Child soldiers are subjected to brutal indoctrination methods used by the armed groups to which they are part. It has been reported that children who disobey their commanders are savagely killed in front of other children in order to set an example.¹²⁰ In these circumstances, child soldiers are constantly under the threat of being tortured or killed. Executing orders is the only way to survive for those children. The Rome Statute clearly indicates that a person is not criminally responsible when the crime was committed under duress.¹²¹ However, in the *Erdemović* case, the ICTY said that duress was only a mitigating factor.¹²² Since duress is approached differently by the various international criminal tribunals, it is not clear whether child soldiers could use this defence as an excuse that would rule out their liability. What is clear is that they could at least invoke duress as a mitigating factor.

IV

CONCLUSION

Child soldiers are complex political individuals who can be considered both victims and perpetrators. If—contrary to calls from most children’s rights organizations, child soldiers who committed crimes are to be treated primarily as perpetrators—one should make sure that a child is indeed legally capable of committing crimes. The main issue when trying to answer the difficult question of child criminal liability is the *mens rea* requirement. Can a child have the intention to commit an international crime? No minimum age for criminal liability is determined by international law for the reason that no consensus can be reached. This age depends on the conception

¹¹⁸ UNICEF “Weah Speaks out About Child Soldiers”, online: UNICEF <http://www.unicef.org/infobycountry/liberia_19220.html>.

¹¹⁹ *Rome Statute*, *supra* note 1, art 31(1)(b).

¹²⁰ See Ongwen Field Note, *supra* note 96.

¹²¹ *Rome Statute*, *supra* note 1, art 31(1)(d).

¹²² *Prosecutor v Erdemović*, IT-96-22-A, Judgment (7 October 1997) at para 19 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <<http://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf>>.

each state has of childhood and therefore, it widely differs from one country to another. Arguments in favour of the prosecution of child soldiers find support in the theories of punishment, in international human rights law and in domestic practices. Moreover, international criminal law provides some openings towards this option. Arguments given against the prosecution of child soldiers are grounded in the idea that the best interests of the child should be respected. In addition to this, in the event prosecutions occur, children would benefit from defences provided by international criminal law.

Based on the above considerations, child soldiers should never be prosecuted under the age of fifteen. However, prosecution of children between fifteen and eighteen is not necessarily the best way to implement the right to reintegration promoted by the CRC. This is the reason why children between fifteen and eighteen could be held accountable in ways other than criminal prosecutions, for instance by using mechanisms of transitional justice other than criminal.¹²³

¹²³ Mark Drumbl, "Reimagining Child Soldiers in International Law and Policy" (Working Paper No 2011-17, Washington and Lee University School of Law, September 2011) online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1921527>.